

1 Can anybody tell me that?

2 MR. PATRAS: I don't know whether there is a  
3 specific sale of the exact identical structure to what is  
4 in the second opinion letter as opposed to this different  
5 category of structure which includes different compositions  
6 and different thicknesses.

7 THE COURT: Then give it to me on the basis you  
8 want to give it to me, which sounds like the second set of  
9 circumstances. I need to know, I just want to know, did the  
10 letter come out before or after you started marketing this  
11 new kind of ClearShield?

12 MR. PATRAS: My understanding is that it came  
13 out before, Your Honor, but I would need to check. I don't  
14 want to misstate something.

15 THE COURT: How can you check that? Can you  
16 check that now? Can you get somebody out looking, finding,  
17 helping me out on that point?

18 MR. CASSLING: I'm not sure, Your Honor, that we  
19 have that information here.

20 There is the issue, too, of the Philips opinion  
21 and the change to this one.

22 THE COURT: Sure. And that deals with opinion  
23 number three; but I'm focussed on opinion number two, and if  
24 somebody wants to go downstairs and get their cell phone and  
25 walk outside and hope they get a signal and call somebody

1 does not foreclose Cryovac from attacking it on  
2 cross-examination and saying it really is not worthy of you  
3 giving credence, and it doesn't say, it doesn't shed light  
4 on their state of mind earlier, at the beginning point in  
5 time, which is an important measuring point.

6 All right. You had to stand up through all  
7 that, Mr. Patras. Sorry about that.

8 MR. PATRAS: That's all right.

9 THE COURT: Do you have an answer to the  
10 question?

11 MR. PATRAS: She is checking on the specifics,  
12 but getting to I think the same point you just addressed  
13 here at the end, Your Honor, I can tell you that the first  
14 sales of any ClearShield product were in March 2004. So the  
15 Spadt opinion letter is within nine months of there being  
16 any sale of any product. That is not the date necessary  
17 for the change in structure but of any ClearShield product  
18 at all, so any changed structure would have been sold for  
19 the first time after March of 2004.

20 THE COURT: Well, I could hear something that  
21 changes my mind, I guess; but for planning purposes, to get  
22 things moving, I think you should be understanding that  
23 I'm going to let those things in and you can go after them  
24 hammer-and-tongs on cross, but it makes more sense to me,  
25 more logical sense to me that under these circumstances, the

1 facts of this case, it's appropriate to allow the defense to  
2 put that in front of a jury.

3 All right. That takes care of that.

4 Mr. Farabow.

5 MR. PATRAS: Thank you, Your Honor.

6 MR. FARABOW: Your Honor, may I respond to two  
7 points?

8 THE COURT: Sure.

9 MR. FARABOW: One is if Your Honor is interested  
10 in hearing why I said it's a one-sentence opinion, I'd be  
11 glad to explain it or I can just show it at the trial.  
12 Whichever you would rather see.

13 THE COURT: Well, I'm happy to have you make  
14 your record here, sir.

15 MR. FARABOW: Additionally, I would like to say  
16 since Your Honor has indicated that you are going to let  
17 the opinions in, we would like to, and expect to, do the  
18 EchoStar investigation of those opinions. We would like to  
19 know any communications that Pechiney had with Mr. Spadt  
20 about the opinions, any communications that there were with  
21 Pechiney about why they needed additional opinions.

22 It's been said it's because of a change of  
23 composition. We think it is because of the inadequacy of  
24 the first opinion. Our plan would be to look at Mr. Spadt's  
25 records, to look at records of Jenner, to look at records of

1 that. They don't have the right at this point. They could  
2 have taken this deposition a long time ago and they had the  
3 right if they came in. And if we had asserted privilege --  
4 they'll never know whether we would have asserted privilege  
5 because they never took the deposition, but if they had,  
6 they would have had the opportunity to come before Your  
7 Honor then for relief.

8 THE COURT: Okay. I have your positions.

9 Mr. Farabow, I'll give you the last crack on  
10 that one.

11 MR. FARABOW: Your Honor, we're not trying to  
12 take any depositions. What we want to do is see the  
13 documents that Pechiney had knowledge of with regard to  
14 these later opinions.

15 MR. CASSLING: We're already providing them,  
16 Your Honor.

17 THE COURT: It sounds to me like you are getting  
18 what you say you want. No?

19 MR. FARABOW: That's fine, Your Honor.

20 THE COURT: Okay. What do we have?

21 MR. PATRAS: Your Honor, the report from home  
22 base is that the first spec sheet that included both the  
23 difference in thickness and difference in composition of  
24 the outer layers is dated October 22nd of 2004. So, two or  
25 three months before Mr. Spadt's opinion letter. That's the

1 specification date as opposed to a first sales date.

2 THE COURT: And you don't know when it was first  
3 marketed? That's what I'm hearing?

4 MR. PATRAS: (Shaking head no.)

5 THE COURT: All right.

6 MR. PATRAS: That was the first the  
7 specification existed is my understanding, Your Honor.

8 THE COURT: Let's move to the next discussion  
9 point, which is one from Pechiney. We just handled one from  
10 Cryovac. Let's take one from Pechiney.

11 MR. CASSLING: Yes, Your Honor.

12 If I could, Your Honor, the one I would like to  
13 address is the motion in limine dealing with Mr. Deily who  
14 is a senior Cryovac executive. They have told us they want  
15 to put Mr. Deily on the stand to testify as to two separate  
16 issues.

17 Issue No. 1, they want Mr. Deily to testify that  
18 Curwood's products, the product not even made by Cryovac,  
19 are unacceptable to customers generally. And they want  
20 Mr. Deily to testify as to trade usage. Specifically, they  
21 want Mr. Deily to tell the jury that trade usage in the  
22 industry equates the terms "supply agreement" with "binding  
23 requirements contract."

24 Mr. Deily has only worked, during his entire  
25 career, for Cryovac. He can certainly testify. And I